



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 2112 of 2011

WILSON MONGARE.....CLAIMANT

VERSUS

SAMSON N. NYAMWARO.....1ST RESPONDENT

ALLOYS N. OSORO.....2ND RESPONDENT

SUPER PREMIUM TOURS AND TRAVEL LIMITED.....3RD RESPONDENT

Rika J

cc. Elizabeth Anyango

Mr. Nyabena, instructed by Nyabena Nyakundi and Company Advocates, for the Claimant.

Mr. Morara instructed by Duke Morara and Company Advocates, for the Respondent.

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Wilson Mongare filed his Statement of Claim on 20th December 2011. The Respondents filed a joint Statement in Response on 20th January 2012. The Claimant gave evidence and closed his case on 9th October 2012. The 1st Respondent gave evidence for himself and his Co-Respondents on this same date, when the proceedings closed. The matter was last mentioned in Court on 9th November 2012 when the Parties confirmed they had filed their closing submissions. The Court advised the Award would be delivered on notice.

2. Mongare testified that he was at the beginning employed by the 1st and 2nd Respondents, in their business running in the name and style of Super Premium Tours and Travel. The business was changed into a Limited Liability Company on 9th February 2011. The Claimant was employed as the Manager Nairobi Branch, on 1st January 2007. He earned a net monthly salary of Kshs. 21,000. His duties comprised ensuring the proper conduct and operations of the Respondents’ business. He worked 7 days a week, without compensation for the excess time worked. He worked during public holidays, again without compensation. He reported to work at 5.00 a.m., and left at 9.00 p.m. meaning he worked 15 hours. He worked diligently. On 31st October 2011, his contract of employment was terminated, without reason or notice. He was not paid his terminal dues. He instructed his Advocates who wrote a letter of demand to the Respondents. There was no compliance. Mongare filed this Claim seeking:-

§ 1 month salary in lieu of notice at Kshs. 21,000;
§ Salary for October 2011 at Kshs. 21,000;
§ Gratuity at 15 days' salary for each completed year of service at Kshs. 42,000;
§ Annual leave of 5 years at Kshs. 84,807.60;
§ Off duty days at Kshs. 138,461.50;
§ Public holidays at Kshs. 80,769;
§ House rent allowance in arrears at Kshs. 182,700;
§ Overtime of 7 hours per day for each year at Kshs. 159,075; and
§ 12 months' salary in compensation for unfair termination at Kshs. 252,000;

Total: Kshs. 901,044.

He seeks also, a declaration that the termination was unfair; the Court issues such other orders as may be deemed fit; costs; interest; and certificate of service be issued.

3. The Claimant told the Court the Respondents operate a Public Service Vehicle transport business. Their vehicles plied the Migori to Nairobi route. The 1st Respondent did not give him notice prior to termination. Nyamwaro simply sent his son to the Claimant, with the message that there was no more work for the Claimant. The Claimant was told there was a change in management. The Respondents did not consult the Claimant before the decision was made. Mongare was involved in several meetings in his role as the Manager. He attached minutes of one such meeting. The company printed receipts for the passengers. These receipts had the Claimant's and the 1st Respondent's cell phone numbers. Cross-examined, the Claimant testified that his full name is Wilson Nyabutu Mongare. The 1st Respondent's identity card gives his name as Simon, not Samson. The contract of employment was oral. The Claimant denied the suggestion by Counsel that he worked as a 'manamba' [tout]. There were no pay slips issued. The Respondents paid the Claimant in bits, sometimes Kshs. 2,000 and on other occasions Kshs. 5,000. He worked over public holidays. There was no attendance register. There was no letter of termination given to the Claimant. He did not lodge any complaint with the Ministry of Labour. Alloys was a partner to the 1st Respondent. He denied that the note dated 8th September 2009, alluding to Managers' and Directors' meeting, was manufactured evidence. He conceded the note is not signed. The note states there would be an annual meeting on 12th December 2009 at Kisii Mwalimu Hotel. No such meeting took place. The letter from the City Engineer dated 9th December 2009 related to the Claimant. He attended the meeting whose agenda was the relocation of South Rift Matatus to Westlands Bus Terminus. The name indicated in the minutes of this meeting was Wilson Nyambui. The company represented by Nyambui is shown to be Super Drum. The Engineer's letter refers to Super Premium Shuttle. The meeting took place at City Hall. The company changed from Nairobi-Kisii route to Nairobi-Kilgoris route. The Claimant testified that he has given sufficient evidence to support his claim. In his demand letter of November 2011, he claimed Kshs. 603,507.60. When he came to Court, he adjusted this to Kshs. 901,044. He denied that his Claim is sheer guesswork. He clarified on re-direction that off-duties and public holidays had not been computed in the demand letter. He was employed by Simon Nyamwaro, who was present in Court at the hearing. The pay slip and the letter of employment were to originate from the Respondents. His cell phone number was shown in the note dated 8th September 2009. The names Nyambui and Super Drum can be attributed to clerical errors. There was no attendance register in place. He managed Nairobi. The Respondents were quite busy elsewhere and left the Claimant to operate the business. He prays the Court to grant the Claim.

4. The Respondents' position is that there was no employment at all, and if there was, it was casual or

tout-paid on commission, arrangement. No Branch Manager can be employed orally. The note dated 8th September 2009 is not authentic. There was no termination, because in the first case, there was no employment. The Claimant is not entitled to any of the prayers. Simeon Nyamwaro told the Court he is not Samson; he is Simeon Nyamwaro, a retired teacher, resident in Kisii. He knows the Claimant. The Claimant is a tout. The Respondents' company is Super Premium Tours and Travel Limited. 'Manambas' direct travelers to the vehicle and are paid a commission of 10% of the fare by the vehicle owner. The Respondents operate a fleet of 18 vehicles. There was no contract with Mongare. He was not a manager. The 1st Respondent could not employ a Manager orally. He could not be paid salary and not receive pay slips. The company has official documents, with a seal. The note dated 8th September 2009 did not have a title and reference. Mongare did not work any overtime because he was not employed by the Respondents. His Claim is misplaced and should be dismissed with costs to the Respondents.

5. Under cross-examination, the 1st Respondent stated that his name is Simon, not Samson. He conceded he is the 1st Respondent. He has known the Claimant from 1980s as a 'manamba'. The company previously operated under a business name. Nyamwaro started off alone, with 2 vehicles. The business currently has a fleet of 18 vehicles plying Kisii, Kilgoris and Loitokitok routes. It employs drivers and booking clerks. It issues letters of employment and payment vouchers to booking clerks. The driver takes care of the day to day management of the assigned vehicle. It is not true that the company employed the Claimant as its Manager. The Respondents keep employment records. The company was incorporated on 9th February 2011. There are many directors, including Alloys and Nyamwaro. The note dated 8th September 2009 contained the 1st Respondent's name and cell phone number. Nyamwaro was not aware of any meeting with the City Engineer, on 29th September 2009. He did not respond to the demand letter from the Claimant's Advocates, because he did not understand it. The working hours fall between 7.00 a.m. and 4.00 p.m. Drivers can go beyond 4.00 p.m. but the offices close at this time. It is not true that the company operated between 5.00 a.m. and 9.00 p.m. Nobody can work all the time without a break. The witness stated he is a retired teacher. He was teaching in 2007. He left in September 2011. He was a full time teacher. He had his own system of managing his business. There were many directors, with Alloys stationed at Nairobi. Nyamwaro did not recognize the receipts shown to him by the Claimant, alleged to belong to the company, and to have Mongare's and Nyamwaro's cell phone numbers. The 1st Respondent could not remember where he was on 31st October 2011. He has not seen the Claimant after this date. The Claimant moved to other vehicles. The touts are paid 10% of the each passenger's fare in commission. It was an oral arrangement, nothing in writing. Nyamwaro concluded his evidence with the emphasis that he is not Samson; he is Simon. Mongare has been a 'manamba' for all the years. He has relocated in the same capacity to Mombasa. The company does not issue employment letters to touts. The Claimant does not exist in the Respondents' records. There were no permanent Managers. Directors worked in shift. Anyone could secure the cell phone number of another. The 1st Respondent urges the Court to dismiss the Claim with costs to the Respondents.

The Court Finds and Awards:-

6. Was the Claimant an employee of the Respondents, and was his contract of employment terminated by the Respondents unfairly? Is he entitled to the pleaded remedies? The 1st Respondent testified that the Claimant was a 'manamba,' paid 10% of a passenger's fare, for every passenger he directed to travel in the Respondent's vehicles. He was not a Manager, the Respondents' Directors having alternated as Managers for their different Branch Offices. The Claimant on his part testified that he was indeed an employee of the Respondents, having first been employed by the 1st Respondent when the 1st Respondent operated as an unincorporated business. He was employed in 2007 through an oral agreement. He earned Kshs. 21,000 per month, which was paid staggeringly. He was assigned the management of the Respondent's Nairobi Branch.

7. Section 2 of the Employment Act 2007 defines 'an employer,' to include 'any person, public body, firm, corporation or company, who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager, or factor of such person, public body, firm, corporation or company.' The term 'employee,' refers to 'a person employed for wages or salary,' while

the term ‘contract of service,’ denotes ‘an agreement, whether oral or in writing, and whether expressed or implied, to employ to serve as an employee for a period of time.’ From these legal definitions, and the evidence given by the respective witnesses, the Court formed the view that Mongare was indeed an employee of the Respondents. He was initially employed by the 1st Respondent as an individual running his transport business under the banner of Super Premium Tours and Travel. The business later obtained limited liability incorporation under the Companies Act Cap 486 the Laws of Kenya. It continued to employ the Claimant. The Respondents were the Claimant’s employers. They employed the Claimant through an oral contract and paid him a salary of 21,000. The evidence of the 1st Respondent that the Claimant was a tout, working on a commission, was wholly unpersuasive. Why does the Court say so?

8. Firstly, the Claimant’s demeanour in Court did not convey the portrait of a ‘manamba.’ He did not fit the characterization of a tout. He appeared too cultured and graceful, to fit in the rough and tumble, of the urban jungle that is the touting industry. Secondly, he provided the Court with documents that show him involved in the management and administration of the 3rd Respondent. The note dated 8th September 2009 captures his name, that of the 1st Respondent and their respective numbers. It describes the details of Directors and various Managers. It is irrelevant that the document is not signed, or that the proposed annual meeting on 12th December 2009 did not take place. The matatu industry is highly informal. Documents are sketchy and not all transactions are documented. The note however does reveal the details of the Directors and the Managers, which details have not been denied by the Respondents. The Claimant was able to provide the Court with a letter from the City Engineer, referring to a meeting with South Rift Matatu Owners held on 26th September 2009. The letter was accompanied by the minutes of the meeting and the public notice issued by the Town Clerk on the subject matter. The Claimant attended this meeting. It is not a material defect that he was misnamed in the minutes, just as the Court does not find it fatal to the Claim herein, that the 1st Respondent has been misnamed as Samson while he is Simeon. It is similarly of no effect that minutes refer to the 3rd Respondent as Super Drum or Super Shuttle. These are minor clerical errors or misperceptions of the authors of the documents, as relates to the identities of the persons and businesses the subject matter of these proceedings. The Claimant and the 1st Respondent clearly know about the persons and events recorded in these documents. In the view of the Court, it would not make sense to send a tout to represent the company in a key meeting with the City Fathers. Mongare represented the company as its Manager for Nairobi. He also referred the Court to the passenger receipts kept by the 3rd Respondent. These have his cell phone number as well as that of the 1st Respondent. It does again appear strange that a tout would have his name imprinted in the receipts issued to passengers by the company. The third reason why the Court chooses to disbelieve the evidence of Nyamwaro, is because he has been a teacher for a long time, with all his time taken up by school work. He was a teacher for the period between 2007 and 2011, when the Claimant states he was an employee of the Respondents. It would make sense for the teacher to find a trusted Manager at Nairobi, to coordinate the company’s fleet of vehicles. It was not plausible that the 1st Respondent would find time to alternate between teaching and managing the vehicles. Nyamwaro did not sound convincing when he told the Court that he had a private way, a system of managing his business. What would the Claimant be doing in Nairobi, if his role was that of a tout, well known to the 1st Respondent at Kisii? The Court is satisfied that Mongare worked for the Respondents as a Manager stationed at Nairobi. His contract was terminated on 31st October 2011. Was it terminated fairly?

9. The 1st Respondent sent his son to the Claimant, with the message that there was no more work. The Respondents had an obligation as employers, to give the Claimant valid reason, or reasons for their decision, as provided for under section 43 and 45 of the Employment Act 2007. This was not done, because in the view of the Respondents, they had not employed the Claimant in the first place. They did not extend to Mongare the procedural rights conferred by both Section 41 and 45 of the Act. He was not heard, but only given a message by the 1st Respondent through the 1st Respondent’s son, that there was no more work. The termination was unfair both for want of substantive justification and procedural fairness. The Claimant is entitled to compensation. **The Court Awards him 10 months’ salary at Kshs. 210,000 in compensation.** He has prayed for 1 month salary in lieu of notice. **The Court grants him 1 month salary in lieu of notice at Kshs. 21,000.** He was not paid salary for the month of October 2011. The Respondent did not bring any employment records, considering that it did not issue employees with

pay slips, to discount the evidence by Mongare that he was not paid his October salary. ***The Court allows the plea for October 2011 salary at Kshs. 21,000.*** His claims for gratuity; annual leave; off duty; public holidays; house allowance; and overtime were not properly explained to the Court in his evidence. These claims were similarly not well articulated in the legal argumentation on record. They were just plain claims, without factual and legal foundation. The 6 claims under these heads are rejected. The certificate of service is a statutory obligation and right under Section 51 of the Act. The Respondent shall release the certificate of service to the Claimant forthwith. There will be no order on the costs and interest. In sum:-

[a] Termination was unfair;

[b] The Respondent shall pay to the Claimant 10 months' salary in compensation at Kshs. 210,000; 1 month salary in lieu of notice at Kshs. 21,000; and October 2011 salary at Kshs. 21,000 all added up at Kshs. 252,000;

[c] Certificate of service shall be availed to the Claimant forthwith;

[d] The sum in [b] shall be paid within 30 days of the reading of this Award; and

[e] No order on the costs and interest

Dated and delivered at Nairobi this 8th day of April 2013

James Rika

Judge